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Supreme Court, U.S.
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In the Supreme Court of the United States

Jeffrey Lutz, Karen Deann, Brian Lind, Karen Hagan-Lind, Jonathan E. Fleck, Susan R. Fleck, Eugene C. Ruehle, Shirley M. Wood-Ruehle, Robert Charles Carson, Barbara Carson, James Simning,

Petitioners,

vs.

Anthony E. Sampair and Laurie K. Sampair,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Legislature has the power to enact curative legislation requiring easement owners in current possession of their easement to record the notice required by the provisions of the state statute or obtain a court order to preserve their easement claim.

2. Whether the interpretation of Subd. 6 of Minn. Stat. §541.023 requiring parties in possession to prove their entitlement to the exception requirement is an unconstitutional deprivation of their property rights.

PARTIES TO THE PROCEEDING

The following individuals and entities were parties to the proceeding in the court below:

Jeffrey Lutz, Karen Deann, Brian Lind, Karen Hagan-Lind, Jonathan E. Fleck, Susan R. Fleck, Eugene C. Ruehle, Shirley M. Wood-Ruehle, Robert Charles Carson, Barbara Carson, James Simning, Douglas M. Krinke, Ursula Beata Krinke, Josephine Berg Simes, James Berg, Firma Bender, The City of Birchwood Village, Anthony E. Sampair and Laurie K. Sampair.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioners, all record owners of easements for access to White Bear Lake, a large and important landmark in Minnesota's Twin Cities, successors in title from conveyances granted to their predecessors in title from over a hundred years ago, respectively pray that a Writ of Certiorari be issued to review the judgment of the Minnesota Supreme Court, affirming the decision of the Minnesota Court of Appeals which affirmed the decision of the District Court, Washington County, Minnesota, granting Respondents motion for summary judgment and dismissing Petitioners' cross-motion for summary judgment. Petitioners argue that the Minnesota Supreme Court's interpretation of Minnesota's curative statute pertaining to real estate titles, commonly called Minnesota's Marketable Title Act, Minn. Stat. §541.023, has been interpreted in an unprecedented way to apply to parties currently in possession arising from duly recorded conveyances. Rights of parties in possession had previously been an exception to Minnesota's Marketable Title Act. Petitioners have argued that the parties in possession exception must be respected to avoid the constitutional problem carefully analyzed in the leading case of *Wichelman v. Messner,* 83 N.W.2d 800 (Minn. 1957) in which the Minnesota Supreme Court held that Minnesota's Marketable Title Act was constitutional as applied to claims of record owners who were not parties in possession. Disregarding the common law presumption that the party currently in possession is presumed to have been in continuous possession, unless abandonment is proved, the Minnesota Supreme Court's new interpretation makes the statute unconstitutional. Because the

precedent of this case could effect the record owners of easements filed long ago which will now require proof of possession by predecessors in title long deceased, thousands of current owners of access easements of this kind who have been happily enjoying their property rights, will have their ownership of property simply taken away for no legitimate public purpose making this case of considerable federal importance.

OPINIONS BELOW

The Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Memorandum of the Washington County District Court, Tenth Judicial District, District of Minnesota, filed July 1, 2008, granting the Respondents' motion for summary judgment and dismissing the Petitioners' cross-motion for summary judgment, is reprinted in the appendix hereto, p. A-1.

The unpublished opinion of the Minnesota Court of Appeals, filed June 9, 2009, is reprinted in the appendix hereto, p. A-10.

The opinion of the Minnesota Supreme Court, filed July 8, 2010, is reprinted in the appendix hereto, p. A-22.

JURISDICTION

The jurisdiction of the Court to review the Opinion of the Minnesota Supreme Court is invoked under 28 U.S.C. § 1254(1).

The original action was commenced under the jurisdiction of the Washington County District Court by the filing of an application to register title. The Petitioners all served timely Answers to the Summons published in the original action. On July 1, 2008, the Washington County District Court

granted a motion for summary judgment of the applicants and dismissed the cross-motions for summary judgment of the Defendants. The Opinion of the Minnesota Court of Appeals was filed on June 9, 2009. The Opinion of the Minnesota Supreme Court was filed on July 8, 2010. The Petition is, accordingly, timely under Rules 13.1 and 13.3 of the Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourteenth Amendment to the United States Constitution

Sec. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Minn. Stat. § 541.0231 Actions Affecting Title to Real Estate

Subd. 1. **Commencement.**

As against a claim of title based upon a source of title, which source has then been of record at least 40 years, no action affecting the possession or title of any real estate shall be commenced by a person, partnership, corporation, other legal entity, state, or any political division thereof, to enforce any right, claim, interest, incumbrance, or lien founded upon any instrument, event or transaction which was

executed or occurred more than 40 years prior to the commencement of such action, unless within 40 years after such execution or occurrence there has been recorded in the office of the county recorder in the county in which the real estate affected is situated, a notice sworn to by the claimant or the claimant's agent or attorney setting forth the name of the claimant, a description of the real estate affected and of the instrument, event or transaction on which such claim is founded, and stating whether the right, claim, interest, incumbrance, or lien is mature or immature. If such notice relates to vested or contingent rights claimed under a condition subsequent or restriction it shall affirmatively show why such condition or restriction is not, or has not become nominal so that it may be disregarded under the provisions of section 500.20, subdivision 1.

Subd. 2. **Application.**

(a) This section shall apply to every right, claim, interest, incumbrance, or lien founded by any instrument, event, or transaction that is at least 40 years old.

(b) This section applies to repurchase options or other rights of repurchase that encumber an interest in land based upon an instrument other than a deed of conveyance granted by a governmental body, agency, or subdivision, unless within 40 years of the recording of the instrument a notice is recorded under subdivision 1. This paragraph does not revive repurchase options or rights of repurchase barred by subdivision 1.

(c) This section does not apply to actions to enforce rights, claims, interests, encumbrances, or liens arising out of private covenants, conditions, or

restrictions to which section 500.20, subdivision 2a, or successor statutes do not apply.

Subd. 2a. **Registered property not affected.**

(a) Except as provided in paragraph (b), this section does not apply to real property while it remains registered according to chapter 508 or 508A.

(b) This subdivision does not affect an action or proceeding involving the validity of a claim of title based upon a source of title which has been of record at least 40 years if:

(i) the action or proceeding is pending on August 1, 2001, or is commenced before February 1, 2002; and

(ii) a notice of the pendency of the action or proceeding is recorded before February 1, 2002, in the office of the registrar of titles of the county in which the real property affected by the action or proceeding is located.

Subd. 3. **Extent of section.**

This section does not extend the right to commence any action beyond the date at which such right would be extinguished by any other statute.

Subd. 4. **Notices, recording; fee.**

County recorders are hereby directed to accept for recording notices conforming with the provisions hereof, and to charge therefore fees corresponding with the fees charged for recording notices of lis pendens of similar length. Such notices may be discharged in the same manner as notices of lis pendens, and, when so discharged, shall, together

with all information included therein, cease to constitute either actual or constructive notice.

Subd. 5. **Abandonment presumed.**

Any claimant under any instrument, event or transaction barred by the provisions of this section shall be conclusively presumed to have abandoned all right, claim, interest, incumbrance, or lien based upon such instrument, event, or transaction; and the title in the name of any adverse claimant to the real estate which would otherwise be affected thereby shall not be deemed unmarketable by reason of the existence of such instrument, event, or transaction; it being hereby declared as the policy of the state of Minnesota that, except as herein provided, ancient records shall not fetter the marketability of real estate.

Subd. 6. **Limitations; certain titles not affected.**

This section shall not affect any rights of the federal government; nor increase the effect as notice, actual or constructive, of any instrument now of record; nor bar the rights of any person, partnership, or corporation in possession of real estate. This section shall not impair the record title or record interest, or title obtained by or through any congressional or legislative grant, of any railroad corporation or other public service corporation or any trustee or receiver thereof or of any educational or religious corporation in any real estate by reason of any failure to record further evidence of such title or interest even though the record thereof is now or hereafter more than 40 years old; nor shall this section require the recording of any notice as provided for in this section as to any undischarged

mortgage or deed of trust executed by any such corporation or any trustee or receiver thereof or to any claim or action founded upon any such undischarged mortgage or deed of trust. The exceptions of this subdivision shall not include (1) reservations or exceptions of land for right-of-way or other railroad purposes contained in deeds of conveyance made by a railroad company or by trustees or receivers thereof, unless said reserved or excepted land shall have been put to railroad use within 40 years after the date of said deeds of conveyance, (2) nor any rights under any conditions subsequent or restrictions contained in any such deeds of conveyance.

Subd. 7. **Source of title.**

For the purposes of this section, the words "source of title" as used in subdivision 1 hereof shall mean any deed, judgment, decree, sheriff's certificate, or other instrument which transfers or confirms, or purports to transfer or confirm, a fee simple title to real estate, including any such instrument which purports to transfer, or to confirm the transfer of a fee simple title from a person who was not the record owner of the real estate. However, any such instrument which purports to transfer, or to confirm the transfer of, a fee simple title from a person who was not the record owner of the real estate to the grantee or transferee named in such instrument shall be deemed a source of title "of record at least 40 years" within the meaning of subdivision 1 only if, during the period of 40 years after it was recorded, the following two conditions are fulfilled: (1) another instrument was recorded which purports to transfer a fee simple title from said grantee or transferee to another person and (2) no instrument was recorded

which purports to be or confirm a transfer of any interest in the real estate by or from whoever was the record owner in fee simple immediately before the commencement of said period of 40 years. The purpose of the next preceding sentence is to limit the effect of erroneous descriptions or accidental conveyances.

STATEMENT OF THE CASE

This is an appeal from the Judgment entered by the Minnesota Supreme Court, one judge concurring and dissenting, affirming the opinion of the Minnesota Court of Appeals upholding the grant of Respondents' motion for summary judgment by the Washington County District Court and the dismissal of the Petitioners' cross-motion for summary judgment.

The District Court case was based on its holding extinguishing the access right-of-way of all of the Defendants in this case relying on the precedent of *B. W. Leo Harris Co. v. City of Hastings*, 59 N.W.2d 813 (Minn. 1953). In *B. W. Leo Harris Co.*, the rights of the record title owner were upheld against a challenge by a party claiming adverse possession. The opinions of the Minnesota Court of Appeals and the Minnesota Supreme Court affirmed the central holding of the District Court with the notable exception of the concurring and dissenting opinion of one justice in the Minnesota Supreme Court who pointed out that parties claiming possession under either adverse or prescriptive rights have only a 15 year requirement of proof of possession. Accordingly, and ironically, the central holding of this case establishes that non-record title claimants to property have a much easier burden of proof of establishing ownership than record holders claiming ownership of possessory rights.

REASONS FOR GRANTING THE WRIT

The Minnesota Supreme Court has extended the application of curative limitations legislation in such a way to render the legislation, as now interpreted, unconstitutional.

This case presents the issue, never directly addressed by this Court, as to whether the limited public interest in clearing land titles can defeat a vested interest of a property owner with both deeded title and possession. In the instant case, it has been held for the first time that an individual's inalienable right to property is subordinate to the public interest in clearing land title defects. The Minnesota Supreme Court achieved this result by ignoring the long-standing common law principle that a party in possession is presumed to have been in continuous possession through their predecessors in possession. Thus, the burden of establishing possession from sixty years ago has been shifted to the party currently in possession rather than the party seeking to bar them from possession. Previously, the proof of abandonment, under both Minnesota statute and the common law, and implicitly the constitution, was required by the parties seeking ejectment of the party in possession. As a practical result, all owners of property deeded long ago are now in jeopardy of losing that property ownership, despite continuous possession, because of this unprecedented decision which has ignored the long-standing principles of common law that avoided the necessity of a constitutional conflict.

The incorrect conclusion reached in this case results from the misapplication of two Minnesota precedents, *B. W. Leo Harris Co. v. City of Hastings*, 240 Minn. 44, 59 N.W.2d 813 (1953) and *Caroga Realty Co. v. Tapper*, 274 Minn. 164, 143 N.W.2d 215 (1966). *Caroga Realty* involved an attempt by a record owner of an easement to re-establish possessory rights after abandonment. *B. W. Leo Harris Co.* involved the attempt of a municipality to establish a right of possession by adverse possession.

The present case, in significant contrast, involves an attack on the rights of easement holders who were both in current possession and grantees of a recorded conveyance. Petitioners argued that the better precedent is *Wichelman v. Messner*, 215 Minn. 88, 83 N.W.2d 800 (1957), Minnesota's leading case in the interpretation of its Marketability Statute. *Wichelman* acknowledged that Subd. 6 granted an exception for parties in possession to the filing requirement of Subd. 5, so that the constitutionality of the statute as applied to non-possessory interests could be discussed without considering the more difficult constitutional issue regarding parties in possession. id. at 820. *Wichelman* did not directly discuss the issue of parties in possession and the common law presumptions regarding possession and title which are that (1) a record owner of property continues to hold record title until proven otherwise, and (2) parties in possession of property continue to maintain possession until proven otherwise. 29 Am. Jur. 2nd **Evidence**, Sec. 298.

B. W. Leo Harris Co. involved the attempt of a municipality to establish underlying title in the first place by adverse possession that had occurred almost one hundred years prior to its lawsuit to establish possession. Counsel for the Petitioners argued in all of the lower court cases that *B. W. Leo Harris Co.* was not applicable because adverse possession is distinguishable from this case involving record title owners. In contrast to *B. W. Leo Harris Co.*, the instant case involves the attempt of a person to defeat the interest and property ownership of record title holders who are also in current possession. The holding of *B. W. Leo Harris Co.* was clearly inapplicable. The *B. W. Leo Harris Co.* analysis was mere dicta and not based on the plain language of the

statute or relevant to the facts of this case. This distinction raised by the Petitioners that they were in possession pursuant to conveyances of record title, and not by adverse possession, should have been dispositive. The rules for someone claiming title by adverse possession as opposed to someone claiming by conveyance are entirely different. The concepts are different. The philosophies are different. The principle under the common law that found holders of record title and parties in current possession as presumed to be continuous until proven otherwise, clearly places the burden of proof on the parties attempting to dispossess them to prove abandonment before the burden of proof of possession could be shifted to the parties claiming possession.

Caroga Realty involved the attempt of a deeded easement holder to re-establish possession after abandonment. Although the analysis in *Caroga Realty* is not clear, the reasoning that an easement holder who has abandoned his interest in property cannot simply later go back into possession is consistent with Minn. Stat. § 541.023. *Caroga Realty,* without clearly stating so, first required proof of abandonment to defeat the attempt of the record easement owner to establish possession. These Petitioners have argued that the Respondents first needed to prove abandonment, which they were unable to do, prior to any attempt by them to place the burden of proof of possession on the Petitioners. Although neither the common law nor constitutional issues raised by these Petitioners in the case were discussed by the Minnesota Supreme Court in *Caroga Realty*, clearly the impact on the inalienable right to property as affected by a curative statute are much more critical in a case where the easement owner is in current possession as opposed to a record easement

holder attempting to re-establish possession after evidence of abandonment.

In *Wichelman v. Messner*, a case of historical importance in Minnesota because of its extensive analysis of the Marketability Statute, which included a consideration of the constitutional issue of curative statutes in general, the consideration of parties in possession was acknowledged but not addressed because of its inapplicability to that case. The *Wichelman* court focused its attention and its analysis of the purpose of the statute on ridding titles of "old ancient records" which "fetter the title" which cause numerous problems for title examiners that required court action to clear. As any experienced title examiner knows, non-possessory interests created by ancient deeds or other documents could create non-possessory interests in persons unknown who were both unaware of their property interest and unable to be located by title examiners. Curative statutes were enacted for the purpose of allowing those interests to be ignored without the necessity of court involvement. Those were the ancient records that fettered title addressed by the court in *Wichelman,* not easements currently in use by the direct successors in interest to the original grantees.

The leading authority on title issues in Minnesota, which has been relied on by Minnesota lawyers and title examiners for 50 years as authoritative, is Patton on Titles. Although the Patton treatise is recognized as a national authority, the fact that Patton himself was an examiner of titles for Hennepin County, Minnesota, and author of other treatises on Minnesota and national real estate law has made him particularly persuasive for Minnesota lawyers. The Second Addition was published in 1957, the same year as *Wichelman v. Messner* and after *B.*

W. Leo Harris Co. In Patton's discussion of curative statutes and the rights of parties in possession, Patton states as follows:

> But, in considering the effect of limitation statutes on a title under examination, an examiner should always bear in mind that, no matter how effectively a defect may appear to have been remedied by limitation, there is the necessity of an investigation in pais as to the rights of any one in possession. The primordial theory of seisin so far subsists as present law that Legislatures cannot require a person in possession of his property, and in full enjoyment of his rights, to commence an action to vindicate his title or to silence adverse claims thereto. They cannot, therefore, make his failure to do what they have no right to require him to do a bar to any action which he may later wish to bring. It is equally true that the Legislature may not, under the guise of a statute of limitation, deprive a person of rights already vested and for the complete ownership and enjoyment of which no legal remedy is required, nor may it require a person having title and possession to take the initiative in court proceedings under penalty of being deprived of his rights. It is also fairly probable that limitation acts which purport to require an occupying claimant to file

> of record some statement of his claim are also void. [emphasis added]

For 50 years, this statement had been considered authoritative and dispositive on the issue of how parties in possession were dealt with in an examination of title of property in Minnesota. By ignoring this practice and precedent, the Minnesota Supreme Court has now not only taken away a valuable property right of these Petitioners, but has also jeopardized similar property rights in similarly situated easement holders all over Minnesota, and likely all over the country. In stark contrast to the substantial loss of property rights suffered by the Petitioners and potential loss to be suffered by similarly situated property owners, there is no valid public purpose to be served by simply changing the current law and requiring all such easement owners to attempt to obtain evidence of usage of their predecessors in title long after they are deceased. The convenience of the title examiner is not a sufficient reason for the Minnesota Supreme Court to simply abandon the common law presumptions which carefully avoided the constitutional conflict.

CONCLUSION

Curative statutes are statutes of convenience. The fundamental distinction between American property law and European property law is that, in America, property rights are not a privilege granted from the sovereign as had evolved from the European practice of feudalism. *Fletcher v. Peck,* 10 U.S. (6 Cranch) 87 (1810). American property law rejected feudalism. Limitations on the use or ownership of private property is limited only by proper application of the government's "police power". See, *McCulloch v. Maryland,* 12 U.S. (4 Wheat.) 316 (1819). It is

dubious that the public interest in "convenience" for title examiners could be considered a proper use of the "police power". It is likely that constitutional challenges from previously affected parties were never brought because, in the past, courts, such as the Minnesota Supreme Court in *Wichelman*, respected the constitutional issue as applied to record owners "in possession" of their property. The blatant disregard for the property owners in this case, in the name of "convenience", is sufficient to bring this constitutional issue to this Court's attention. The regulatory balance between non-possessory interest and possessory interest needs to be restored or the traditional right to private property in America will disappear.

Respectfully Submitted,

Dated: October 6, 2010

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Counsel for Petitioners

APPENDIX INDEX

Findings of Fact, Conclusions of Law, Order and Judgment and Memorandum of the Washington County District Court, Tenth Judicial District, for the District of Minnesota, filed July 1, 2008... A-1

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STATE OF MINNESOTA IN DISTRICT COURT
COUNTY OF TENTH JUDICIAL DISTRICT
WASHINGTON

In the Matter of the Application of Anthony B. Sampair and Laurie K Sampair to register the title to the Following described real estate situated in Washington County, Minnesota, namely: Lots 1 and 2, Block 1, Lakewood Park Third Division,

Applicants,

v.

Village of Birchwood, *et al.*,

Defendants.

Court File: C7-06-2146

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND JUDGMENT

The above-entitled matter came on for hearing at the Washington County Government Center, Stillwater, Minnesota, on July 1, 2008. The hearing was upon cross-motions for summary judgment and on Applicants' Motion to Compel Discovery.

Appearances:

For Applicants Anthony E. Sampair and Laurie K. Sampair: Mark E. Greene, Esq. of Bernick, Lifson, Greenstein, Greene, Liszt, P.A., Suite 1200, the Colonnade, 5500 Wayzata Blvd., Minneapolis, MN 55416.

For Remaining Defendants Jeffrey Lutz, Karen

Deann, Brian Lind, Karen Hagan-Lind, Jonathan E. Fleck, Susan R, Fleck, Eugene C. Ruehle and Shirley M. Wood-Ruehle, and Robert Charles Carson: Wayne B. Holstad, Esq., 30 E. 7th Sr., #1690, St. Paul, MN 55101.

For Remaining Defendants Douglas M. Krinke, Ursula Beata Krinke, Josephine Berg Simes, James Berg, and Firma Bender: Fredrick W. Knaak, Esq., and Greg T. Kryzer, Esq,, Knaak & Kantrud, P.A., 3500 Willow Lake Blvd, Suite 800, Vadnais Heights, MN 55110.

For Remaining Defendants concerning the Applicant's Motion to Compel, Gary B. Bodelson, Esq., 247 Third Ave S., Minneapolis, MN 55415.

Defendant James Simning, *pro se,* 310 Wildwood Ave., White Bear Lake, *MN* 55110.

Non-Appearance:

Defendant Village, a/k/a/ City of Birch: wood. Cameron R. Kelly, Esq., 1809 Northwestern Ave., Stillwater, MN 55082.

Based upon all of the files, records and proceedings herein, the arguments of counsel, and the applicable law, the court makes the following:

FINDINGS OF FACT

1. In these proceedings, applicants seek to register land. A default judgment was earlier granted against non-answering defendants and judgment on the pleadings was granted against certain other defendants.
2. The Village a/k/a City of Birchwood has not objected to the extinguishment of the historic right of way easement at issue.
3. The applicants own the property legally described as: Lots 1 and 2, Block 1,

Lakewood Park Third Division, Washington County, Minnesota.

4. The remaining defendants own nearby non-lakeshore lots and claim an interest in the applicants' property under separately deeded, non-exclusive easements- granted over Lot 1. The easements were granted in the early 1900's for the limited purpose of providing access to the shore of White Bear Lake for boating band bathing,
5. No defendant has filed any notice of an easement over Lot 1 of applicants' property within 40 years of the record grant of their respective easements, nor since 1948, under Minn, Stat. 541.023
6. Remaining defendants have not provided sufficient evidence to create a material issue of fact regarding their alleged possession of the easement that could rebut the presumption of abandonment under Minn. Stat. 541,023.
7. The applicants have agreed with the Village, a/k/a City, of Birchwood to grant the city a reasonable easement for a storm sewer over the southwest comer of Lot 1, as shown on the applicant's survey.
8. The applicants have agreed with the State of Minnesota that the registration of their property shall include the following language:

   Subject to the proprietary and sovereign rights of the State of Minnesota in all that portion of the land lying below the natural ordinary high water mark of White Bear Lake; not intending, however, to deprive the fee owners of the usual riparian rights

that attach to the land riparian to a meandered public body of water incident to the ownership thereof.

Based upon the foregoing, the Court makes the following:

CONCLUSIONS OF LAW

1. The remaining defendants have abandoned all rights, claims, interests, encumbrances, or liens regarding the applicants' property under Minn. Stat. 541.023.
2. The remaining defendants are barred from objecting to the registration of applicants' property.
3. The "right of way" granted over Lot 1, Block 1, Lakewood Park Third Division is hereby extinguished and terminated.
4. Applicants shall have title to the estate in the lands described in the Second Amended Cross Application registered in their names:
    a. Subject to the proprietary and sovereign rights of the State of Minnesota in all that portion of the land lying below the natural ordinary high water mark of White Bear Lake; not intending, however, to deprive the fee owners of the usual riparian rights that attach to the land riparian to a meandered public body of water incident to the ownership thereof.
    b. Subject to a reasonable easement for a storm sewer over the southwest corner of Lot 1, as shown on the applicants' survey.

ORDER FOR JUDGMENT

1. Applicants' motion for summary judgment is hereby GRANTED.
2. Remaining defendants' motion for summary judgment is DENIED.
3. Remaining defendants' motion for a permanent injunction against applicants herein is DENIED.
4. Remaining defendants motion for an order instructing the Registrar of Titles to memorialize the easement of each. of the remaining defendants is DENIED.
5. Applicants' motion to compel further discovery is DENIED.
6. The Registrar of Titles is hereby directed to register the estate in the lands described in accordance with the Applicants' Second Amended Cross Application in accordance with the above Conclusion.

The attached Memorandum is made a part of this Order.

LET JUDGMENT BE ENTERED FORTHWITH.

Dated: July 1, 2008

s/_____

Richard T. Jessen
Judge of District Court (Retired)
301 Oak Drive
Foley, MN 56329
320-968-6910

MEMORANDUM

A. CROSS-MOTIONS FOR SUMMARY JUDGMENT

The decision in this case is governed by Minn. Stat. 541.023.

The right-of-way easements at issue were created in written instruments dating back to 1907 through 1909. Reference to the easements was made in subsequent, recorded conveyances to the current time. This is not yet Torrens (registered) property.

Applicants are successors in interest to the owners of the servient estate. Defendants are successors in interest to the original owners of the applicants, the Sampairs, signed the Cross-Application for Title Registration on November 15, 2005. (The Sampairs bought the property July 27, 2007, after this litigation was commenced). The court file was opened April 6, 2006. Service of various parties was made personally and by publication,

There is no claim that any of the defendants or their predecessors in title filed the 40-year notice required by Minn. Stat. 541.023, Subd. 1.

Since about 96 years have passed since the easements were created, and since the 40-year notice was not recorded, the decision turns on whether defendants were in possession of the easement under Minn. Stat. 541,023, Subd. 6.

The possession-exception applies to easements under Minn. Stat. 541.023. *Wichelman v. Messner,* 83 N.W.2d 800, 814 (MN. 1957). See *Township of Sterling v. Griffin,* 244 N.W.2d. 129 (MN. 1976); *Caroga Realty Co v. Tapper,* 143 N.W.2d 215 (MN. 1966); *Lindberg v. Fasching; 667* N.W.2d 481 (Minn.App. 2003).

Although not cited by any of the parties, the

Minnesota Supreme Court decision in *B. W. & Leo Harris Co v. City of Hastings,* 59 N.W.2d 813 (MN.1953), answers a key question in this case, i.e., when must possession begin and how long must it last in order to qualify for the exception to the 40-year notice requirement in Minn. Stat. 541.023. The court said:

> Thus, to avoid the conclusive presumption of abandonment imposed by the statute, the claimant's possession must be continuous. If the claim is based upon an instrument, event, or transaction... which becomes or became 40 years old after January 1, 1948, the claimant's possession must begin or have begun at the end of the 40-year period and must continue until action is commenced.

59 N.W.2d 813, 816 (emphasis added).

Lindberg v. Fasching, 667 N.W.2d 481, 487 (Minn.App.2003), also recognized that "In evaluating possession and use, the critical timeframe is the end of the 40-year period."

The defendants have the burden of proving possession that qualifies for the Subd. 6 exception. The statutory conclusive presumption of abandonment places the burden on defendants. Minn. Stat. 541.023, Subd. 5. Defendants rely upon case law, including *United Parking Stations, Inc.,* v. *Calvary Temple,* 101 N.W.2d 208 (MN.1960) for their argument that the burden of proof is on the applicants to prove abandonment. However, In *United Parking,* the abandonment holding was based upon a separate theory of common law abandonment. Here, under Minn. Stat, 541.023, Subd, 5, the statutory presumption against defendants requires

them to prove possession, rather than requiring applicants to prove abandonment.

The only evidence produced by defendants that could possibly qualify for consideration is the affidavits of Josephine Berg Simes and James Simning. None of the other defendants, including James Berg, have alleged any admissible evidence to establish usage of the easement prior to the 1970's.

The affidavit of Josephine Berg Simes covers the relevant time period going back to before August 30, 1949. While her affidavit does not provide any details about who used the easement, when the easement was used, how often the easement was used, and what it was used for, there might be enough of a fact question to deny plaintiffs' motion for summary judgment. *Contra, B.* W *Leo Harris Co v. City of Hastings,* 59 N.W.2d 813, 817 (MN.1953) (holding that vagueness of details of alleged possession were "...inadequate to fulfill the requirements of the law."). However, Ms. Simes also denied any use of the easement since at least 1941, before the Second World War, by her family, because instead they used the Dock Association access, according to the January 6, 2005, letter-exhibit attached to her affidavit. See *Banbury v. Omniation Intern., Inc.,* 533 N.W.2d 876, 881 (Minn.App. 1995)(contradictory evidence; no material fact issue).

The court concludes that Ms. Simes has not produced evidence that would create a material fact question as to whether she and her family were in continuous possession of the easement on and. after August 30, 1949, until this litigation was commenced in 2005 or 2006.

James Simning did not acquire an easement over the subject property until 1986. He has not produced any evidence that his predecessors in

interest were in continuous possession of the easement prior to 1949 through commencement of the litigation in 2005 or 2006. The alleged use of the servient easement by strangers, including James Simning's relatives prior to 1986 does not establish his possession. "As we indicated in *Caroga Realty Co* v. *Tapper,* 274 Minn. 164, 179, 143 N.W.2d 215, 225, the possession contemplated by Minn. St. 541.023, subd. 6, is such as will provide notice of the possessor's interest in the property." (emphasis added.) See also, United Parking, *supra,* (occasional use by school children and strangers did not qualify as use or possession by the claimant). James Simning was not a possessor prior to 1986.

This case highlights the reason why Minn. Stat. 541.023 was enacted, i.e., that ancient records should not fetter the marketability of real estate. For defendants to avoid applicants' motion for summary judgment, they needed to produce admissible evidence from at least 1949 through 2005 or 2006 when this litigation commenced. Evidence from the 1970's until now, while relevant, is not enough to defeat the motion. This court must assume that evidence of possession from the 1950's and 1960's does not exist or must have been lost or is unobtainable.

Because defendants have not presented evidence of possession that would entitle them to a summary judgment in their favor, much less a trial, defendants' motion for summary judgment and for a permanent injunction is denied.

Applicant's motion for summary judgment is granted.

B. Applicant's MOTION TO COMPEL

In light of the foregoing order, applicant's motion to compel is moot.

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 48041.08, subd. 3 (2008).

STATE OF MINNESOTA
IN COURT OF APPEALS

A08-1494
A08-1505

In the Matter of the Application of Anthony E. Sampair and Laurie K. Sampair to register the title to the following described real estate situated in Washington County, Minnesota, namely: Lots 1 and 2, Block 1, Lakewood Park Third Division, applicants,

Respondents,

vs.

Village of Birchwood, et al.,

Defendants,

Jeffrey Lutz, et al.,

Appellants (A08-1494),

Josephine Berg Simes, et al.,

Appellants (A08-1505).

Filed June 9, 2009
Affirmed
Halbrooks, Judge

Washington County District Court
File No. C7-06-2146

Mark E. Greene, Sarah L. Krans, Bernick & Lifson, P.A., The Colonnade, Suite 1200, 5500 Wayzata Boulevard, Minneapolis, MN 55416 (for respondents)

Wayne B. Holstad, 30 East 7th Street, Suite 1690, St. Paul, MN 55101 (for appellants Jeffrey Lutz, Brian Lind, Karen Hagan-Lind, Karen Deann, James Simning, Jonathan and Susan Fleck, Eugene and Shirley Ruehle, Robert and Barbara Carson).

Frederic W. Knaak, Greg T. Kryzer, Knaak & Kantrud, P.A., 3500 Willow Lake Boulevard, Suite 800, Vadnais Heights, MN 55110 (for appellants Josephine Berg Simes, James Berg, Frima Bender, Douglas Krinke and Ursula Beate Krinke)

Cameron R. Kelly, Kevin S. Sandstrom, Eckberg, Lammers, Briggs, Wolff & Vierling, P.L.L.P., 1809 Northwestern Avenue, Stillwater, MN 55082 (for amicus curiae The City of Birchwood Village)

Considered and decided by Johnson, Presiding Judge; Halbrooks, Judge; and Ross, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

In these consolidated appeals, appellants challenge the district court's grant of summary judgment to respondents based on the district court's determination that the Marketable Title Act (MTA), Minn. Stat. § 541.023 (2008), applies to appellants' claimed easement interests. Appellants contend that of-record easements cannot 'be extinguished by the MTA. In the alternative, appellants argue that they have preserved their claimed easement interests pursuant to the MTA's possession exception. Because there are no genuine issues of material fact and the district court applied the law correctly, we affirm.

FACTS

Approximately 100 years ago, numerous easements were created for purposes of boating and bathing access to White Bear Lake. The easements were granted across property now owned by respondents Anthony E. Sampair and Laurie K. Sampair.

In April 2006, James T. Krizak and Christina R. Palme-Krizak applied to register title to their lakefront property in Washington County (the property). The property includes Lots 1 and 2 of Block 1, Lakewood Park Third Division. In July 2007, the Krizaks conveyed the property to respondents. As part of the registration process, respondents sought to terminate numerous easements over Lot 1 of the property. The examiner of titles identified approximately 60 parcels that were owned by at least 37 different individuals or families. Respondents served each property owner and subsequently obtained default judgments against the majority of them.

Appellants, who own nearby, non-lakeshore lots, answered respondents' complaint, asserting their claims for easements creating lakeshore access.[1] Appellants' easement interests can be traced to deeds that were created and recorded in the first decade of the 20th century. Each deed granted a "right of way" over Lot 1 for access to the shore of White Bear Lake for the purposes of boating and bathing. Appellants Eugene Ruehle and Shirley Ruehle claim an easement created by a January 5, 1907 deed. Appellants Karen Hagan-Lind and Brian Lind claim an easement created by a July 6, 1908

[1] We conclude there are ten claimed easements at issue—one for each parcel of property owned by the 16 appellants.

deed. Appellants Jonathan Fleck and Susan Fleck and Douglas Krinke and Ursula Beate Krinke claim easements created by an April 12, 1909 deed. Appellant Karen Deann and appellant James Simning claim easements created by a June 19, 1909 deed.[2]

Appellants Jeffrey Lutz, Robert Carson and Barbara Carson, Josephine Berg Simes, Frima Bender,[3] and James Berg claim easements created by an August 30, 1909 deed.[4]

Three motions for summary judgment were filed: one by respondents, one by a group of five appellants, and one by a group of 15 appellants. The latter group also moved the court for a permanent injunction against respondents. Respondents also moved to compel discovery.

The district court held that the MTA applies and found that none of the appellants had filed a

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[2] Simning states by affidavit that he owns three properties. It is not clear from the record how many easements he claims or when any of his easements were created. The record indicates that Simning and his wife received part of Lot 2, Block 6, Lakewood Park Third Division. Deann owns another part of that lot, and she traces her easement to a deed conveying Lot 2 in its entirety.

[3] Appellant Frima Bender died during the pendency of this appeal.

[4] Simes and Bender were sisters; Berg is Simes's son. According to Simes, her parents purchased the family property in 1943. In 1989, Bender received the northeast portion of this property; Simes received the southwest portion. In 2002, Simes and her husband conveyed their interest to Simes and Berg. It is not clear from the record when the easements claimed by Bender, Berg, and Simes were created. But it appears that these three appellants own part of Lot 3, Block 6, Lakewood Park Third Division. The August 30, 1909 deed, cited by Lutz and the Carsons, conveyed Lot 3 in its entirety and established an easement over Lot 1.

notice of easement as required by the MTA. The district court also held that appellants had "not provided sufficient evidence to create a material issue of fact regarding their alleged possession of the easement that could rebut the presumption of abandonment under [the MTA]." The district court granted respondents' motion for summary judgment and extinguished appellants' claimed easements over Lot 1 of the property. Appellants' motions for summary judgment and a permanent injunction were denied, as was respondents' motion to compel discovery.

The subsequent appeals of Lutz, Deann, the Flecks, the Linds, the Carsons, the Ruehles, and Simning (the Lutz appellants), and the appeals of Simes, Bender, Berg, and the Krinkes (the Simes appellants) were consolidated. The City of Birchwood Village filed an amicus brief in support of respondents.

DECISION

I.

As a preliminary issue, we consider whether Simning is a party to this appeal. Simning is listed in the caption of the Lutz appellants' notice of appeal and statement of the case. His name does not appear on the brief's cover, but he is mentioned as an appellant in the brief itself. Minn. R. Civ. App. 103.01, subd. 2, provides: "When a party in good faith files and serves a notice of appeal from a judgment or an order, and omits, through inadvertence or mistake, to proceed further with the appeal, or to stay proceedings, the appellate court may grant relief on such terms as may be just." We conclude that the omission of Simning's name from the cover of the Lutz appellants' brief was a clerical

error. Respondents make no argument that they will suffer prejudice if Simning is considered a party to this appeal. We therefore conclude that Simning is an appellant.

II.

On appeal from summary judgment, we review de novo whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *STAR Ctrs., Inc. v. Faegre & Benson, LLP*, 644 N.W.2d 72, 76-77 (Minn. 2002).

> A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law. On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted.

Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993) (citation omitted). "[W]hen the nonmoving party bears the burden of proof on an element essential to the nonmoving party's case, the nonmoving party must make a showing sufficient to establish that essential element." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

The MTA applies "to every right, claim, interest, incumbrance, or lien founded by any instrument, event, or transaction that is at least 40 years old," Minn. Stat. § 541.023, subd. 2(a), including easements. *See Lindberg v. Fasching*, 667 N.W.2d 481, 485-87 (Minn. App. 2003), *review denied*

(Minn. Nov. 18, 2003); *see also Hersh Props., LLC v. McDonald's Corp.*, 588 N.W.2d 728, 735 (Minn. 1999). Appellants state that they all possess abstracts of title that identify two transactions that occurred early in the 20th century—the platting of the subdivision and the subsequent initial conveyance of lots within the subdivision. All of the initial conveyances included a right of access to White Bear Lake over Lot 1. When an easement is created by a deed more than 40 years old, the claimant of the easement must file notice as described in the MTA within 40 years of the easement's creation or the easement is conclusively presumed to have been abandoned. *See Hersh Props.*, 588 N.W.2d at 734; *United Parking Stations, Inc. v. Calvary Temple*, 257 Minn. 273, 275, 101 N.W.2d 208, 210 (1960); *B.W. & Leo Harris Co. v. City of Hastings*, 240 Minn. 44, 48-49, 59 N.W.2d 813, 816 (1953). Here, no appellant claims to have satisfied the MTA's notice requirement. And it is clear from caselaw that merely recording the deed by which an easement was created does not satisfy the statutory-notice requirement. *See Caroga Realty Co. v. Tapper*, 274 Minn. 164, 166, 179-80, 143 N.W.2d 215, 218, 226 (1966) (extinguishing an easement created by a recorded deed).

Appellants argue that they are exempt from the MTA under the possession exception, which states that the MTA "shall not . . . bar the rights of any person, partnership, or corporation in possession of real estate." Minn. Stat. § 541.023, subd. 6. An easement may be possessed under subdivision 6 of the MTA, excusing the claimant from the filing requirement. *See Lindberg*, 667 N.W.2d at 485. The claimant bears the burden of establishing possession. *See Twp. of Sterling v. Griffin*, 309 Minn. 230, 235,

244 N.W.2d 129, 133 (1976) (stating that a party seeking to escape application of the MTA must establish possession to bring it within the exception of subdivision 6). To demonstrate possession, appellants must show (1) use of their respective easements no later than the expiration of the 40-year periods following the creation[5] of their easements and (2) use from the end of the 40-year period until the commencement of the action. *See Sterling*, 309 Minn. at 237, 244 N.W.2d at 133; *B. W. & Leo Harris*, 240 Minn. at 49, 59 N.W.2d at 816; *Lindberg*, 667 N.W.2d at 487.[6]

To survive dismissal of their claims on a motion for summary judgment, appellants must show that use of their respective easements commenced by the end of the respective 40-year periods—dates which range from January 5, 1947 to August 30, 1949. The only evidence in the record relating to use within the relevant 40-year period involves the easements claimed by Simes, Berg, and

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[5] Here, the dates of creation are the dates of execution for the deeds establishing the easements—not the dates when the deeds were recorded. *See* Minn. Stat. § 541.023, subd. 1 (extinguishing claims "founded upon any instrument, event or transaction which was executed or occurred more than 40 years prior to the commencement of such action"); *see also Caroga*, 274 Minn. at 166, 143 N.W.2d at 218 (stating that a right-of-way was created "through the execution of a written instrument" that was later recorded).

[6] At the time *Sterling* and *B. W. & Leo Harris* were decided, the MTA distinguished between claims that would have been 40 years old on January 1, 1948, and claims that would have been 40 years old after that date. *See B.W. & Leo Harris*, 240 Minn. at 49, 59 N.W.2d at 816. A series of amendments in 2001 eliminated this distinction, applying the MTA to all claims at least 40 years old unless an exception applies. 2001 Minn. Laws ch. 50, §§ 31-32, 35.

Bender. Berg stated by affidavit that his family has used "the Easement" every year since their purchase of the property. But the record indicates that Berg was born after the expiration of the relevant 40-year period. His statements regarding his family's use of any easement in the 1940s are therefore inadmissible. *See* Minn. R. Civ. P. 56.05 (requiring affidavits to be made "on personal knowledge").

Simes has presented the only evidence that she, Bender, and their predecessors-in-interest used their claimed easements across Lot 1 before their 40-year period expired on August 30, 1949. Simes submitted two affidavits. In these documents, Simes stated that, since the summer of 1943, she has been at her family's property during the summer months and "does not remember a year in which the Easement was not used by a member of the Berg family or their guests for purposes of accessing White Bear Lake." Simes also stated that she had seen Bender "use the lakeshore easement continually over the past sixty years."

As the district court acknowledged, at first blush, this evidence seems to be sufficient for Simes, Bender, and Berg to defeat the summary-judgment motion. But the content of Simes's affidavits is contradicted by the content of the correspondence that she attached to one of the affidavits. One of these letters, dated January 6, 2005, was sent from Simes's attorney to the Krizaks. The relevant part of the letter states:

> We are the attorneys for Josephine Simes and her family.
>
> The purpose of this letter is only to put you on actual notice of the existence of an easement over your property for lake

> access purposes for the benefit of the Simes property near yours. . . .The easement has existed for many decades.
>
> As a practical matter, Ms. Simes and her family have been members of the dock association next to your property since before the Second World War *and have had no reason to exercise their right of entry*. Nor is there any reason for you to expect that they would want to do so in the foreseeable future, given their ease of access over the Dock Association's dock and access point.

(Emphasis added.)

"A self-serving affidavit that contradicts other testimony is not sufficient to create a genuine issue of material fact." *Risdall v. Brown-Wilbert, Inc.*, 759 N.W.2d 67, 72 (Minn. App. 2009), *review denied* (Minn. Mar. 17, 2009); *see also Griese v. Kamp*, 666 N.W.2d 404, 408 (Minn. App. 2003) (stating that "a party cannot eliminate the damage done in prior evidence by providing later, contradictory evidence"), *review denied* (Minn. Sept. 24, 2003). Simes's statements in her affidavits that she and her family have used their easements every year since 1943 cannot be reconciled with the statements made by her attorney on her behalf that she and her family have used the dock-association property and lake-access point instead of Lot 1.[7] Simes's affidavits do not clarify or explain the prior statements—they are

[7] Amicus curiae City of Birchwood Village has provided material indicating that the public has access to White Bear Lake via a vacated roadway easement adjacent to Lot 1 that has been dedicated as a boat launch. The launch area includes a village dock-association boat dock and boat lifts.

an attempt to negate them. We therefore conclude that Simes has not presented evidence that creates a genuine issue of material fact regarding possession.

Due to appellants' failure to show use before the expiration of their respective 40-year periods, we do not reach the issue of whether appellants have shown possession from the end of their 40-year periods to the commencement of the registration action. But we note that the proper standard for showing possession of an easement is set forth in *Lindberg*. 667 N.W.2d at 486-88. *Lindberg* makes it clear that the MTA possession standard is "flexible" and "more relaxed" than the standard for showing an easement by prescription. *Id.* at 485-86.

III.

Appellants assert that the burden of proving possession properly belongs with respondents. As discussed above, Minnesota caselaw clearly demonstrates that the burden of showing possession falls to the party who failed to comply with the MTA's filing requirement and seeks to prevent extinguishment of his or her interest. It is not our role to change or extend the law. *Lake George Park, L.L.C. v. IBM Mid-Am. Employees Fed. Credit Union,* 576 N.W.2d 463, 466 (Minn. App. 1998), *review denied* (Minn. June 17, 1998); *Tereault v. Palmer,* 413 N.W.2d 283, 286 (Minn. App. 1987), *review denied* (Minn. Dec. 18, 1987). Because the district court properly placed the burden of proving possession with appellants, we decline to address appellants' argument that respondents have not met their burden with regard to possession.

IV.

Appellants appear to challenge the

constitutionality of the MTA as applied to them. Appellants raise this issue for the first time on appeal.[8] Constitutional issues generally will not be addressed for the first time on appeal. *See In re Welfare of C.L.L.*, 310 N.W.2d 555, 557 (Minn. 1981). Furthermore, appellants did not notify the attorney general of their challenge to the constitutionality of the MTA. *See* Minn. R. Civ. App. P. 144. We therefore decline to consider appellants' constitutional arguments.

Affirmed.

[8] There is no record of oral argument before the district court, and appellants' summary-judgment memorandum does not raise the issue.

STATE OF MINNESOTA
IN SUPREME COURT
A08-1494 A08-1505

Court of Appeals

Gildea, C.J.
Concurring in part, dissenting in part, Anderson, Paul H., J.
Took no part, Meyer, and Stras, JJ.

In the Matter of the Application of Anthony E. Sampair and Laurie K. Sampair to register the title to the following described real estate situated in Washington County, Minnesota, namely: Lots 1 and 2, Block 1, Lakewood Park Third Division, applicants,

Respondents,

vs.

Filed: July 8, 2010
Office of Appellate Courts

Village of Birchwood, et al.,
Defendants,

Jeffrey Lutz, et al.,
Appellants (A08-1494),

Josephine Berg Simes, et al.,
Appellants (A08-1505).

Mark E. Greene, Sarah L. Krans, Bernick, Lifson, Greenstein, Greene & Liszt P.A., Minneapolis, Minnesota, for respondents.

Wayne B. Holstad, St. Paul, Minnesota, for appellants Jeffrey Lutz, et al.;

Frederic W. Knaak, Jessica A. Johnson, Greg T. Kryzer, Knaak & Kryzer, P.A., Vadnais Heights, Minnesota, for appellants Josephine Berg Simes, et al.

Cameron R. Kelly, Kevin S. Sandstrom, Eckberg, Lammers, Briggs, Wolff & Vierling, P.L.L.P., Stillwater, Minnesota, for amicus curiae City of Birchwood Village.

SYLLABUS

The Marketable Title Act possession exception requires those seeking its protection to prove use of an easement sufficient to put a prudent person on notice of the easement, giving due regard to the nature of the easement at issue. That possession must be proved for a period beginning at the deadline for filing notice under the Marketable Title Act—within 40 years of when the property interest was created—and continuing through the filing of the relevant action regarding ownership.

Affirmed in part, reversed in part.

OPINION

GILDEA, Chief Justice.

This appeal involves the application of Minn. Stat. § 541.023 (2008), also known as the Marketable Title Act (MTA), to a number of easements which have been of record over 40 years. The issue before us is whether the conclusive presumption of

abandonment in the MTA operates to extinguish appellants' interests in the easements, or whether appellants fall under the MTA's exception for parties in possession of real estate. The parties dispute the proper standard of proof necessary to satisfy the MTA's possession exception and who bears the burden of proof to demonstrate possession. We conclude that the MTA possession exception requires those seeking its protection to prove use of an easement sufficient to put a prudent person on notice, giving due regard to the nature of the easement at issue. We further conclude that the MTA possession exception requires those seeking its protection to prove possession beginning at the deadline for filing notice under the MTA—i.e., within 40 years of when the property interest was created—and continuing through the filing of the relevant action regarding ownership. Because some appellants have met this standard sufficiently to survive a motion for summary judgment and others have not, we affirm in part and reverse in part.

Roughly 100 years ago, several easements were granted across a lakeshore property in Washington County for the purpose of allowing access to White Bear Lake for swimming and boating. That lakeshore property is now owned by respondents, Laurie and Anthony Sampair. Before the Sampairs bought the property, their predecessors in interest, James T. Krizak and Christina R. Palme-Krizak, had filed an application for the property to be registered as Torrens property under Minnesota Statutes chapter 508 (2008).

After purchasing the property in 2007, the Sampairs continued to pursue the Torrens registration application. As part of that application, they sought to have a number of the recorded

easements terminated. The Sampairs served each easement owner and won default judgments against the majority of them.

The 15[1] appellants answered the Sampairs' complaints and claimed easements across the Sampairs' property. Appellants' claimed easements were created by deeds issued roughly 100 years ago. Each deed granted a "right of way" over what is now the Sampairs' property to allow boating and swimming in White Bear Lake.

After submitting affidavits asserting use of their claimed easements for various periods of time, appellants moved the district court for summary judgment, a permanent injunction against respondents, and an order instructing the Registrar of Titles to memorialize their easements. The Sampairs also moved for summary judgment and filed a motion to compel discovery. The district court granted the Sampairs' motion for summary judgment and denied all other motions.

The district court held that Minn. Stat. § 541.023 applied to appellants' claimed easements and found that none of the appellants had filed the required notice of their claims under that statute. Therefore, appellants were conclusively presumed to have abandoned their easements. The district court further held that none of the appellants had provided

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[1] Respondents contend that one of the 16 named appellants, Barbara Carson, is not a party to this case as they assert that she did not answer the Sampairs' complaint. There is no record in the district court file indicating that Barbara Carson was named in, or answered, the complaint. Carson's spouse, Robert Carson, is a party, and the deed for the property at issue includes only his name. Because Barbara Carson is not listed on that deed, and because she apparently was neither served with nor answered a complaint, she is not a party to this case. Thus, she is not included among the appellants in this appeal.

sufficient evidence to create a genuine issue of material fact as to whether they met the possession exception of Minn. Stat. § 541.023. The district court stated that the affidavits of Josephine Berg Simes, relating to an easement shared by Simes, James Berg, and Frima Bender, might contain allegations of sufficient facts to create an issue of material fact, but the court concluded that, because Simes's affidavits appeared to be contradicted by the contents of an earlier letter written by her lawyer that she attached to one of her affidavits, the sham affidavit doctrine precluded the court from considering Simes's affidavits. Therefore, the court held that none of the appellants had created an issue of material fact.

Appellants appealed to the court of appeals, which affirmed the district court on the same grounds. *In re Sampair,* No. A08-1494, A08-1505, 2009 WL 158766, at *1-5 (Minn. App. June 9, 2009). We granted appellants' petition for review.

I.

On an appeal from a grant of summary judgment, we review de novo whether there are any genuine issues of material fact and whether the district court erred in applying the law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76 (Minn. 2002). In doing so, we view the evidence in the light most favorable to the party against whom summary judgment was granted—in this case, the appellants. *Fabio v. Bellomo,* 504 N.W.2d 758, 761 (Minn. 1993).

This case is governed by the MTA, Minn. Stat. § 541.023, and our precedent construing that statute. The MTA provides:

As against a claim of title based upon a

> source of title, which source has then been of record at least 40 years, no action affecting the possession or title of any real estate shall be commenced . . . to enforce any right, claim, interest, incumbrance, or lien founded upon any instrument, event or transaction which was executed or occurred more than 40 years prior to the commencement of such action, unless within 40 years after such execution or occurrence there has been recorded in the office of the county recorder in the county in which the real estate affected is situated, a notice . . . setting forth the name of the claimant, a description of the real estate affected and of the instrument, event or transaction on which such claim is founded, and stating whether the right, claim, interest, incumbrance, or lien is mature or immature.

Minn. Stat. § 541.023, subd. 1. The MTA applies to every property interest "founded by any instrument, event or transaction that is at least 40 years old." *Id.*, subd. 2(a).

By operation of the MTA, when X holds property in fee simple that has been of record for over 40 years, and Y claims an interest in that property that is also at least 40 years old, then Y, or Y's predecessors in interest, must have filed the statutorily prescribed notice of Y's claim within 40 years of the creation of the interest Y now claims. *See* Minn. Stat. § 541.023; *Wichelman v. Messner,* 250 Minn. 88, 99-101, 112, 83 N.W.2d 800, 811-13, 819-20 (1957). The purpose of notice under the MTA is to confirm the continuation of Y's interest in property

and to eliminate stale claims that may clutter X's title. *See Wichelman,* 250 Minn. at 99-101, 83 N.W.2d at 812-13. Any potential claimant who has not filed the statutorily prescribed notice within 40 years of the creation of its interest "shall be conclusively presumed to have abandoned" any interest it might have had in the property. Minn. Stat. § 541.023, subd. 5. Easements are among the property interests that can be eliminated under the MTA. *See, e.g., Caroga Realty Co. v. Tapper,* 274 Minn. 164, 177-80, 143 N.W.2d 215, 224-26 (1966).

Appellants do not dispute that their easements are more than 40 years old, and they concede that they (and their predecessors in interest) did not file the notice required by the MTA. But appellants contend that their easement rights remain viable because of an exception in the MTA. That exception to the presumption of abandonment provides that the provisions of the MTA do not "bar the rights of any person . . . in possession of real estate." Minn. Stat. § 541.023, subd. 6. Even though easements are not possessory estates, the possession exception of the MTA may be invoked by easement holders. *See, e.g., Caroga Realty Co.,* 274 Minn. at 177-80, 143 N.W.2d at 224-26. The question presented in this case therefore is whether the possession exception applies to save appellants' easements. *See* Minn. Stat. § 541.023, subds. 1, 5, 6.

Before turning to the merits of that question, we must first resolve the parties' disputes relating to the application of the possession exception. Specifically, the parties dispute the possession standard and the possession period, and they disagree as to which party has the burden of proving possession. We address each issue in turn.

A.

We turn first to the question of the possession standard. Specifically, the parties dispute what kind and degree of "possession" is necessary to satisfy the MTA's possession exception. *See* Minn. Stat. § 541.023, subd. 6. Appellants argue that we should adopt the possession standard and reasoning from *Lindberg v. Fasching*, 667 N.W.2d 481 (Minn. App. 2003), a case in which the court of appeals traced the evolution of the MTA possession standard and articulated a standard in the context of easements. Respondents do not argue for a particular possession standard but instead argue that, whatever the possession standard, appellants have failed to show possession during the proper possession period.

Lindberg concludes that the MTA possession standard for easements should give "due regard . . . to the nature of the easement" at issue, but that use of the easement should be "sufficiently obvious so that a prudent person would be put on inquiry regarding the existence of the easement." *Id.* at 486-87. To reach its conclusion, *Lindberg* had to reconcile apparently conflicting case law from our court. *See id.* at 485-88 (discussing the various standards used in our case law). Namely, we stated in *Caroga Realty*, a case addressing the MTA possession standard in the context of an easement, that possession had to be

> present, actual, open, and exclusive and must be inconsistent with the title of the person who is protected by this section. It cannot be equivocal or ambiguous but must be of a character which would put a prudent person on inquiry.

Caroga Realty Co., 274 Minn. at 178, 143 N.W.2d at 225 (quoting *B.W. & Leo Harris Co. v. City of*

Hastings, 240 Minn. 44, 49, 59 N.W.2d 813, 816-17 (1953)) (internal quotation marks omitted). But that standard was taken wholly and without explanation from *B.W. & Leo Harris Co.,* a case that dealt with the MTA possession standard in the context of a claim of adverse possession, not an easement. *See B. W. & Leo Harris Co.,* 240 Minn. at 47, 59 N.W.2d at 815 (noting that defendant's claim was one "of adverse possession").

We conclude that the *B. W. & Leo Harris Co.* standard should not apply to the possession of easements, because that standard may be impossible to meet. The use of a right-of-way easement is very unlikely to be "exclusive" for instance. Further, the use of an easement is not necessarily "inconsistent with the title" of a servient-land owner in the way adverse possession is. *See Caroga Realty Co.,* 274 Minn. at 178, 143 N.W.2d at 225; *see also Rogers v. Moore,* 603 N.W.2d 650, 657 (Minn. 1999) (discussing elements needed to establish adverse possession). Indeed, we have recognized the need for a more flexible MTA possession standard for easements. In *Wichelman v. Messner,* we implied in dicta that right-of-way easement holders might meet the MTA possession standard if their easements "are manifested by actual use or 'occupancy' (consistent with the nature of the easement created)." 250 Minn. 88, 102, 83 N.W.2d 800, 814 (1957); *see also United Parking Stations, Inc. v. Calvary Temple,* 257 Minn. 273, 276-77, 101 N.W.2d 208, 210-11 (favorably citing the *Wichelman* dicta in a case addressing MTA possession standard in the context of an easement).

In another case dealing with the MTA possession standard for easements, we articulated a possession standard nearly identical to the one the court of appeals adopted in *Lindberg,* but without

specifically addressing the adverse possession standard applied in *Caroga Realty*. *See Township of Sterling v. Griffin*, 309 Minn. 230, 236, 244 N.W.2d 129, 133 (1976). *Cf. Caroga Realty*, 274 Minn. at 179, 143 N.W.2d at 226 (suggesting that, to establish possession under the MTA, the inquiry is whether the claimant "was making use of [the easement] so notorious as to be considered adverse possession"). In *Griffin*, we cited *Wichelman, B. W. & Leo Harris Co.*, and *Caroga Realty* and defined the possession standard as use that would put a prudent person on notice of the easement, giving due regard to the nature of the easement. *Griffin*, 309 Minn. at 236, 244 N.W.2d at 133 ("[T]he possession contemplated by Minn. St[at. §] 541.023, subd. 6, is such as will provide notice of the possessor's interest in the property."). Given that the nature of easements vary, we acknowledged that the nature of the possession also varies. *Id.* (noting that "possession of a town road will differ from that of a private easement"). But we said that the possession "must nevertheless be sufficient to provide the substitute notice contemplated by the act in subd. 6," and therefore it must not "fall below that which will put a prudent person on inquiry." *Id.*

In *Griffin* we did not directly reject the apparently conflicting possession standard from *Caroga*. We do so now. We hold that the standard we articulated in *Griffin* is the standard of possession for easements under subdivision 6 of the MTA. This standard requires use sufficient to put a prudent person on notice of the asserted interest in the land, giving due regard to the nature of the easement at issue. 309 Minn. at 236, 244 N.W.2d at 133.[2]

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[2] To the extent *Caroga* is inconsistent with this opinion, it is

B.

We turn next to the question of the possession period. Specifically, the parties dispute the period of time during which one must demonstrate possession in order to fall within the possession exception in the MTA. The appellants argue that we should interpret the MTA possession exception as requiring proof of possession during the 40-year period immediately before the present action, or alternatively that there should be no set possession period at all, but rather a factual inquiry regarding possession on a case-by-case basis. Appellants further argue that public policy supports their reading of the MTA. Respondents contend that we have already decided the question of the possession period and have repeatedly interpreted the MTA possession exception as requiring proof of possession from the end of the deadline for filing notice under the MTA[3] through the date of the relevant action. We agree with respondents.

Our precedent has consistently interpreted the MTA possession exception as requiring a possession period beginning at the deadline for filing notice—i.e., within 40 years of when the property interest was created—and continuing until the action regarding ownership of the real estate was filed. We stated in *B. W. & Leo Harris Co.*:

> If a claimant subject to the provisions of the [MTA] has not filed the required

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overruled.

[3] The deadline for filing notice of a claim under the MTA is 40 years after the property interest was created. *See* Minn. Stat. § 541.023, subd. 1.

> notice, the only way he can avoid the statute's conclusive presumption is by being in possession at the time [the presumption] would otherwise take effect. If at any later time he abandons his possession, the bar falls and he cannot revive his right by again going into possession. Thus, to avoid the conclusive presumption of abandonment imposed by the statute, the claimant's possession must be continuous. . . . [T]he claimant's possession must begin or have begun at the end of the 40-year period [for filing notice] and must continue until action is commenced.

B. W. & Leo Harris Co., 240 Minn. at 49, 59 N.W.2d at 816.[4]

As appellants correctly point out, *B.W. & Leo Harris Co.* did not address the MTA possession exception in the context of easements, but we have applied this same standard in every case that has involved easements. In *United Parking Stations,* we interpreted the MTA to require a claimant to a right-of-way easement to prove possession beginning on the day of the deadline for filing the MTA required notice. *United Parking Stations, Inc.* 257 Minn. at 275-77, 101 N.W.2d at 210-11. In *Caroga Realty,* a case dealing with the MTA's application to a right-of-way easement, we cited and applied the possession period

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[4] When *B. W. Leo Harris* was decided, the MTA drew a distinction between claims that became 40 years old before or after Jan. 1, 1948. *See* Minn. Stat. § 541.023 (1949). The statute has since been amended to do away with this distinction. *See* Act of Apr. 26, 2001, ch. 50, § 31-32, 35, 2001 Minn. Laws 119, 137-39. The alterations to the quoted material from *B. W. & Leo Harris* reflect the change in the statute.

articulated in *B. W. & Leo Harris Co. Caroga Realty Co.*, 274 Minn. at 177-80, 143 N.W.2d at 224-26. Finally, in *Griffin*, we applied the same standard again, requiring that a claimant of a right-of-way easement seeking to invoke the MTA possession exception, for which the period for filing the MTA required notice had expired, to have been in possession of its easement from the notice deadline "up to the commencement of [the] action." *Griffin*, 309 Minn. at 236-37, 244 N.W.2d at 133 (citing *Caroga Realty Co.*, 274 Minn. at 170-72, 143 N.W.2d at 220-21).

Appellants misread the above cases, arguing that neither *B. W. & Leo Harris Co.*, nor its progeny apply in the context of easements under the MTA. Though *B. W. & Leo Harris Co.* deals with adverse possession rather than easements, it principally interprets the MTA, and appellants make no compelling arguments as to why the possession period articulated in that case should not apply here. This is especially true given the fact that we have applied the *B.W. & Leo Harris Co.* possession period in all of the MTA cases dealing with easements discussed above.

Appellants also cite *Wichelman* to support their argument that the proper possession period is the 40 years immediately before the present action. *Wichelman* does not support appellants' argument. *Wichelman* dealt with whether the MTA applied to certain future interests. *See Wichelman*, 250 Minn. at 105, 83 N.W.2d at 816. Though *Wichelman* did address the possession exception for easements briefly in dicta, it did not discuss the length of the possession period at all. *Id.* at 117-18, 83 N.W.2d 823. We therefore reject appellants' argument that *Wichelman* requires that we depart from *B.W. & Leo*

Harris Co. and its progeny.

Appellants argue in the alternative that there should be no set possession period, but rather the court should make an overall factual determination of possession. They base this argument on the plain language of the MTA, which states that the statute shall not "bar the rights of [anyone] in possession of real estate" and which does not mention any particular possession period. Minn. Stat. § 541.023, subd. 6. But we have never undertaken an overall factual determination when interpreting the MTA possession exception. Instead, we have, since shortly after the MTA was enacted, consistently applied the same possession period when addressing the MTA's possession exception. *See, e.g., B.W. & Leo Harris Co.*, 240 Minn. at 49, 59 N.W.2d at 816.

At their core, appellants' arguments that we should announce a novel possession period rely on their assertion that the MTA possession period articulated in earlier cases is unduly burdensome. We do not disagree that it might be challenging for appellants to prove continuous possession of their claimed easements from the 1940's until this action was filed. But we have repeatedly interpreted the language of the MTA to require such proof. Appellants' argument would require that we overrule over 60 years of our precedent. We decline to do so. *See State v. Lee*, 706 N.W.2d 491, 494 (Minn. 2005) ("We are 'extremely reluctant to overrule our precedent under principles of stare decisis.' When overruling precedent, we have required a 'compelling reason' to do so." (internal citations omitted) (quoting *Oanes v. Allstate Ins. Co.*, 617 N.W.2d 401, 406 (Minn. 2000))).

Appellants also claim that necessity of proof of possession beginning at the deadline for filing MTA

required notice is contrary to the understanding of the Minnesota real estate bar. Appellants point to Minnesota Title Standard No. 61, as the primary foundation for this claim. That standard states, as an illustrative example of the MTA possession exception, that "[t]he owner of rights under a . . .right-of-way. . . or other easement manifested by actual use or occupancy consistent with the nature of the easement created is considered to be in 'possession' of the servient estate." Minn. State Bar Ass'n, *Minnesota Standards for Title Examinations*, No. 61, n.2 (as amended Nov. 15, 2008). Title Standard No. 61 cites *Wichelman* as authority. *Id.* Our reading of that example, however, is that it is silent with regard to the possession period required by the MTA. The title standard simply states that a party may invoke the possession exception of the MTA if that party meets the requirements of that exception. The requirements of the MTA possession exception, as discussed above, are that a claimant has met the possession standard over the required possession period, both of which are articulated in our case law.

In sum, the appellants may be correct that the possession period applicable here is burdensome. But the MTA has the stated policy that "ancient records shall not fetter the marketability of real estate" and operates to extinguish certain, otherwise-valid interests in real estate if those interest holders failed to file the MTA's prescribed notice. Minn. Stat. § 541.023, subd. 5. Possession is an exception that excuses the failure to file a notice of claim, and is therefore appropriately limited. *See id.*, subd. 6. In our case law laying out the required possession period for easements, we have given effect to the language of the statute in both the stated purpose of the MTA and the possession exception—as we are required to do.

See Minn. Stat. § 645.17(2) (2008) ("[T]he legislature intends the entire statute to be effective and certain."). The legislature has been aware of our longstanding interpretation and despite several amendments to the MTA since we decided *B. W. & Leo Harris Co.*, the legislature has not acted to change our interpretation. *See* Minn. Stat. § 645.17 (4) (2008) ("[W]hen a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language"). We therefore reject appellants' arguments and hold that the MTA possession exception requires proof of possession beginning at the deadline for filing notice under the MTA—i.e., within 40 years of when the property interest was created—and continuing through the filing of the relevant action regarding ownership.

C.

We turn next to the issue of who bears the burden of proving possession under the MTA possession exception. Appellants argue that the burden of proof should have been on the respondents to prove that appellants conclusively abandoned their easements, rather than on appellants to prove possession as the district court required. Respondents contend that case law clearly places the burden of proof on the appellants.

To support their argument that the burden of proof is on respondents, appellants point to *Wichelman*. Specifically they note language in *Wichelman* that states that for the MTA to operate and extinguish an interest in real estate, "the person against whom the act is invoked must be one who is 'conclusively presumed to have abandoned all right,

claim, interest . . .' in the property." *Wichelman*, 250 Minn. at 112, 83 N.W.2d at 819 (quoting Minn. Stat. § 541.023, subd. 5). But this language from *Wichelman* does not address burdens of proof. Rather it was part of our interpretation of the MTA itself, interpreting the operation of the MTA to apply only to someone who has been "conclusively presumed to have abandoned" their interest. *Id.* The MTA makes clear to whom that conclusive presumption applies: those who had certain interests in real estate over 40-years old and who did not file the required notice. *See* Minn. Stat. § 541.023, subds. 1, 5. The MTA goes on to state an exception to this conclusive presumption for those in possession of real estate. *Id.*, subd. 6. In this case, the required notice has not been filed, and therefore appellants are conclusively presumed to have abandoned their easements if they do not qualify for the possession exception. Appellants misread *Wichelman* as assigning a burden of proof to respondents.

But our case law does address the allocation of the burden of proof. In *B. W. & Leo Harris Co.* we placed the burden of proof on the party seeking to invoke the MTA possession exception. *B. W. & Leo Harris Co.*, 240 Minn. at 50, 59 N.W.2d at 817. Likewise in *Griffin*, a case dealing with the application of the MTA to easements, we placed the burden of proof on the party seeking to invoke the possession exception. We stated:

> Appellant's interest in the . . . property was not registered as required by the [MTA]. Thus, if [appellant] is to escape the act's bar, appellant must establish its possession of the [right-of-way easement] to bring it within the exception of subd. 6.

Griffin, 309 Minn. at 235, 244 N.W.2d at 133. Both of these cases follow the general rule that a party who stands to benefit from proving the affirmative of a proposition of fact—here the appellants benefitting from establishing possession of their easements—bears the burden of proof as to that proposition. *See Chemlease Worldwide, Inc. v. Brace, Inc.*, 338 N.W.2d 428, 437 (Minn. 1983). Further we have stated that "all else being equal, the burden is better placed on the party with easier access to relevant information." *In re UnitedHealth Group Inc. Shareholder Derivative Litig.*, 754 N.W.2d 544, 561 (Minn. 2008) (internal quotation marks omitted). Here appellants know the most about their own possession of the easements and the identities and locations of their predecessors in interest. We therefore hold that the appellants, as the parties seeking the protection of the MTA possession exception, bore the burden of proving possession.

II.

Having analyzed the law relevant to this case, we turn to an application of that law to the facts, and examine whether under the standards discussed above, summary judgment was properly entered against appellants. Specifically, we must examine whether any of the appellants has demonstrated a genuine issue of material fact as to the applicability of the possession exception in subdivision 6 of the MTA. *See* Minn. R. Civ. P. 56.03.

A.

We address the claims of 12[5] of the 15

[5] These 12 appellants are Doulas Krinke, Ursula Beate Krinke, Jeffrey Lutz, Brian Lind, Karen Hagan-Lind, Karen Deann, Jonathan Fleck, Susan Fleck, Eugene Ruehle, Shirley Ruehle, Robert Carson, and James Simning.

appellants first. These appellants were required to file notice under the MTA during the period 1947 to 1949. *See* Minn. Stat. § 541.023, subd. 1. These 12 appellants concede that neither they nor their predecessors in interest filed any such notice. They likewise do not assert that they used their claimed easements before the 1980s.[6] Additionally, these 12 appellants have not offered any evidence of their predecessors in interest having used their claimed easements. These 12 appellants therefore have not created any issue as to possession going back to the late 1940s, 40 years after their interests were created. Thus, under the possession standard and possession period discussed above, none of the 12 appellants created a genuine issue of material fact as to whether they fall within the MTA's possession exception. *See* Minn. Stat. § 541.023, subd. 6; *see also, B. W. & Leo Harris Co.*, 240 Minn. at 49, 59 N.W.2d at 816. Consequently, by operation of the MTA, the 12 appellants are conclusively presumed to have abandoned their easements.[7] *See* Minn. Stat. § 541.023, subd. 5.

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[6] Indeed, several of these appellants alleged that they first started using their claimed easements as recently as 2005 and 2006.

[7] The concurrence/dissent argues that we should deny the respondents' motion for summary judgment, and remand to allow each of the appellants the opportunity to prove adverse possession of the lake-access easements. But the appellants have not pleaded, argued, or attempted to prove adverse possession at any stage of this litigation. Accordingly, that question is not before us. *Duenow v. Lindeman*, 223 Minn. 505, 512, 27 N.W.2d 421, 426 (1947) ("After all, parties to a lawsuit do not become subject to the court's power for all purposes, but only to the extent that judicial power is invoked by the issues raised to decide the particular questions such issues present for decision.").

B.

The remaining three appellants, Josephine Berg Simes, James Berg, and Frima Bender (collectively, the Berg appellants),[8] who all claim a single, shared easement, have asserted continuous use of their claimed easement dating back at least 60 years. Specifically, Simes stated in one of her two affidavits that she has been to her family's property, and that she, a member of her family, or a guest has used the easement every year since 1943 "for purposes of accessing White Bear Lake." Further, in her second affidavit, Simes asserted that she has seen Bender use the easement continually for the past 60 years for the same purpose.

The Berg appellants argue that these affidavits satisfy their burden in creating a genuine issue of material fact as to possession of their claimed easement for the required period under the MTA possession exception. The district court and the court of appeals disagreed, holding that because letters attached to the first Simes affidavit contradicted statements in the affidavits, the Berg appellants had not created an issue for trial as to the possession exception. Those letters state: "Ms. Simes and her family have been members of the dock association next to your property since before the Second World War and have had no reason to exercise their right of entry" and "the Berg/Simes family . . . have been using the Dock Association access next to your property for many years, notwithstanding the existence of deeded access to the lake over the

[8] Simes and Bender are sisters and Berg is Simes's son. Apparently they all owned their property and easement in common. Frima Bender has died during the pendency of this case.

easterly portion of your property."

The Sampairs argue, and the district court and court of appeals held, that these letters directly contradict Simes's affidavits, and therefore the Simes affidavits cannot be used to create a genuine issue of material fact of possession of her easement under the "sham affidavit doctrine." *See Risdall v. Brown-Wilbert, Inc.*, 759 N.W.2d 67, 72 (Minn. App. 2009), *rev. denied* (Minn. Mar. 17, 2009) ("A self-serving affidavit that contradicts other testimony is not sufficient to create a genuine issue of material fact."). We disagree.[9]

When the letters are construed in the light most favorable to the Berg appellants, they are not inconsistent with the assertions in the Simes affidavits of continuous use of the easement. This is so because the letters could be read as related solely to use of the easement for dock access, and not to use

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[9] We have recognized that a party cannot create an issue for trial by directly contradicting prior sworn testimony with a later-filed self-serving affidavit. *See Hoover v. Nw. Private Mortgage Banking*, 632 N.W.2d 534, 541 n.4 (Minn. 2001); *Augustine v. Arizant, Inc.*, 751 N.W.2d 95, 101 (Minn. 2008) (reaffirming the rule articulated in *Hoover*). That situation does not exist in this case. Simes did not submit one affidavit and then a later self-serving affidavit directly contradicting the first. Rather Simes made her first affidavit, which dealt with her use of the easement and incorporated the letters from her attorneys that arguably conflicted with her assertions of continuous use of the easement. Simes made a second affidavit shortly thereafter. Simes' second affidavit dealt with Bender's use of the easement. Bender was apparently suffering from Alzheimer's syndrome at the time and was unable to make her own affidavit attesting to her own experiences. So, instead of a second self-serving affidavit directly in conflict with the first, we have a first, arguably internally inconsistent affidavit, and a second affidavit with a separate purpose. We have never applied the sham affidavit doctrine in such a context, and we decline to do so here.

of the easement for lake access more generally. When so construed, the letters do not disprove or directly contradict the continued use set forth in the Simes affidavits. The possession alleged in the Simes affidavits is not described in any detail. A trier of fact might ultimately find that the Berg appellants' claimed use of the easement is not credible because it is too general or because of the statements in the attorneys' letters. But given the standard of review for summary judgment, requiring that we view evidence in the light most favorable to appellants, the Simes affidavits raise genuine issues of material fact as to the possession of Simes, Berg, and Bender during the entirety of the possession period. Because the Berg appellants have raised a genuine issue over their continuous possession of the easement going back over 60 years, we hold that the Sampairs were not entitled to summary judgment as to the Berg appellants.

We reverse the grant of the Sampairs' motion for summary judgment as to appellants Berg, Simes, and Bender. We affirm as to all other appellants.

Affirmed in part, reversed in part.

MEYER, J., took no part in the consideration or decision of this case.

STRAS, J., not having been a member of this court at the time of the argument and submission, took no part in the consideration or decision of this case.

CONCURRENCE & DISSENT

ANDERSON, Paul H., Justice (concurring in part, dissenting in part).

I agree with the court that the possession exception under the Marketable Title Act (MTA),

Minn. Stat. § 541.023 (2008), if applied to an easement, requires no more than proof of use of the easement sufficient to put a prudent person on notice, giving due regard to the nature of the easement. I also agree with the court that the burden to prove use of the easement should fall upon those claiming possession. I have reservations about the court's holding that the possession exception requires proof of continuous possession from the deadline for filing the notice of interest required by the MTA, but find it unnecessary to address that question because I would resolve this case on other grounds.

Under the court's holding, most of these appellants never had any interest in the easement purportedly conveyed by their respective deeds, their predecessors in title being deemed to have abandoned the easement sometime before 1950. But it is clear that at least some of the appellants were using the easement when this action was filed. By its terms, the MTA cannot "bar the rights of any person, partnership, or corporation in possession of real estate." Minn. Stat. § 541.023, subd. 6. Adverse possession of an easement requires proof of use of the easement for a period of only 15 years. *See* Minn. Stat. § 541.02 (2008). If subdivision 6 of the MTA is to have any meaning, then a party who cannot prove continuous use of the easement for the period required under the MTA as interpreted by our court must nevertheless be afforded the opportunity to establish ownership of the easement by adverse possession. If we simply affirm the court of appeals, the Torrens certificate will issue without notice of the easement and, under Minn. Stat. § 508.25 (2008), appellants will be forever barred from claiming an easement over the property. On remand, I would allow each of the appellants the opportunity to prove

adverse possession of the easement.